

ETHICS IN GOVERNMENT ACT PUBLIC ACCESS ISSUES

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Public Access to SF 278 Reports under the Ethics Act:

- The Standard Form (SF) 278 Executive Branch Personnel Public Financial Disclosure Reports are to be made available for public inspection and copying within 30 days of filing with an agency. See section 105(b)(1) of the Ethics in Government Act of 1978 (5 U.S.C. appendix) and OGE's executive branchwide access provision thereunder at 5 C.F.R. § 2634.603. The OGE Form 201 is the branchwide form used to request access under the Ethics Act.

- Public access is governed by the special procedures of section 105 of the Ethics Act, *not* the regular access procedures of the Freedom of Information Act (FOIA) (5 U.S.C. § 552). See Church of Scientology v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993), appeal dismissed per stipulation, No. 93-8431 (5th Cir. 1993) (SF 278s available only under the special access procedures of the Ethics Act; otherwise, FOIA exemption (b)(3)(B) applies — for information whose disclosure is barred by statute that in effect establishes particular criteria for withholding).

- Alternate “displacement” theory not yet litigated (judicial review would then be on Administrative Procedure Act arbitrary/capricious standard basis, rather than FOIA *de novo* basis).

- Note different information required, prohibited uses, etc. — see below and the OGE Form 201 access form.

- Some agencies have a procedure to notify filers when their SF 278 reports are requested (access requests are in turn publicly available via a 201). Such notification is optional, not required by the Ethics Act or OGE’s branchwide regulations. OGE itself generally does not provide notification of requests.

Information Required For Ethics Act (§ 105(b)) Access:

- Written application (the OGE Form 201 or equivalent agency form) providing name, address, occupation & signature of requester (plus, optional, office telephone #), the name & address of any person/organization, if any, on whose behalf the material is sought, an indication of an awareness of the prohibitions on obtaining or using SF 278 reports (prohibited uses) as well as

a specification of the material (SF 278s or other covered records) copies (or inspection) of which are requested. See section 105(b)(2) & (c)(1) of the Ethics Act and 5 C.F.R. § 2634.603(c)(1)-(c)(3) & (f).

Prohibited Uses of SF 278 Reports (Notice on OGE Form 201):

- ❶ For any unlawful purpose.
 - ❷ For any commercial purpose, other than by news and communications media for dissemination to the general public.
 - ❸ For determining or establishing the credit rating of any individual.
 - ❹ For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.
- *Penalty for misuse:* civil monetary penalty, assessable in a Federal district court action by the Civil Division of the Department of Justice (DOJ), in an amount now (as of 09/29/99) of up to \$11,000 under section 105(c)(2) of the Ethics Act, as adjusted in 5 C.F.R. § 2634.703 of OGE's regulations (see 64 Fed. Reg. 47095-47097 (08/30/99)) and 28 C.F.R. part 85 (§ 85.3(a)(4) in particular) of DOJ's regulations (see 64 Fed. Reg. 47099-47104 (08/30/99)).

"Other Covered Records" Subject to Ethics Act Access Procedures (see Part III of OGE Form 201 for the first four):

- ❶ Certificates of divestiture (see 5 C.F.R. § 2634.1004 + OGE informal advisory memo 99x9).
- ❷ 18 U.S.C. § 208(b)(1) & (b)(3) waiver determinations, hybrid procedure subject to FOIA/statutory deletions (see 18 U.S.C. § 208(d)(1) and 5 C.F.R. § 2640.304 + OGE informal advisory letter 93x34).
- ❸ Publicly available qualified trust materials (see section 102(f)(5)(D) & (f)(7)(B) of the Ethics Act, plus 5 C.F.R. §§ 2634.408(a) & (d) and 2634.603(g)(2) and appendixes A, B & C to part 2634): (i) trust instruments (except testamentary disposition provisions); (ii) list of assets transferred to trust (& assets sold if blind trust); (iii) report & list of assets at trust dissolution; and (iv) certificates of independence & compliance.
- ❹ Other OGE Form 201 access forms (see section 105(b)(2) of the Ethics Act & 5 C.F.R. § 2634.603(d)).

⑤ OGE-approved gifts reporting waiver request letters — the “wedding gifts” exclusion (see 5 C.F.R. § 2634.304(f)(2), not mentioned on the form).

● An OGE Form 201 can also be used to make a request, which is processed under the Freedom of Information Act, for copies of OGE transmittal letters to concerned Senate committees for signed, public SF 278 reports of Presidentially appointed, Senate-confirmed (PAS) executive branch nominees (+ enclosures, including ethics agreements), with redaction of any FOIA exempt information. For a discussion of various issues concerning nominee ethics agreements (including public disclosure), see OGE DAEOgram DO-01-013 (03/28/2001) & OGE informal advisory memo 88x13 (part II) (09/12/1988).

Retention Periods:

● General six-year retention period (& public availability) for SF 278s (but one year for unsuccessful candidates/nominees) & OGE Form 201s, then destroyed unless further needed in an ongoing investigation.

● Per section 105(d) of Ethics Act, OGE’s regulations at 5 C.F.R. § 2634.603(d) & (g), the OGE/GOVT-1 Privacy Act executive branchwide system of records, and General Records Schedule (GRS) 1, item 24.a. for SF 278s (future item 2.a. of a new broader Ethics Program Records GRS).

Fees Chargeable:

● For actual direct cost of reproduction and mailing of SF 278 reports, if any agency so provides by its own regulation (see section 105(b)(1) of the Ethics Act and 5 C.F.R. § 2634.603(e) of OGE’s executive branch regulations).

● See OGE’s own internal SF 278 duplication fee rules at subpart G of its FOIA & Ethics Act fees regulation at 5 C.F.R. part 2604 that provide for a charge of 3¢ a page plus mailing cost, subject to a de minimis exclusion of \$10.00 or less (= 333 pages free of charge, if no mailing fee); not a branchwide regulation.

Other Requests/Demands for Access:

● Various Federal investigative agencies, the Congress, courts, other government units and private parties can make documentary requests or serve subpoenas on agencies for SF 278s as well as other ethics records.

● If the person or forum seeking or demanding official records or testimony has jurisdiction over the agency concerned (issues can differ in Federal v. State court/admin. proceedings -- sovereign immunity & Supremacy Clause as to State proceedings), most of the FOIA exemptions would not apply; the provisions of the Privacy Act (5 U.S.C. § 552a) would apply to any information contained in a "system of records." See routine uses a. & b. of the OGE/GOVT-1 records system for Ethics Act public access to SF 278s and section 208(b) waiver determinations (as to waivers, see OGE 93x34 for a discussion of disclosure v. nondisclosure issues regarding confidential OGE Form 450 reports) and, for other specific disclosures, routine uses c.-h.

● If the Privacy Act (PA) applies to requested/subpoenaed materials, the exceptions to the general disclosure prohibition (absent written permission of the individual concerned) could allow various releases/governmental uses of records, even without an Ethics Act access request (OGE Form 201), but not with a subpoena alone. See *Doe v. DiGenova*, 779 F.2d 74, 77-85 (D.C. Cir. 1985) & *Doe v. Stephens*, 881 F.2d 1457, 1465-1467 (D.C. Cir. 1988) — need an actual judge-issued court order (exception (b)(11)), authorized written investigatory demand (exception (b)(7)) or another Privacy Act basis for release, but not an exception (b)(3) routine use (insufficient for subpoena release); plus, note PA exception (b)(2) for required FOIA disclosure.

● Other authority must be consulted to determine if agency must/should divulge information; also, various governmental litigation privileges (such as deliberative process) may apply, particularly as to demands by private litigants (not usually asserted as to investigatory agency or Congressional demands); plus, note agency *Touhy* procedural regulations.

Forms:

● The SF 278, the OGE Form 201 and the access customer survey are OMB-cleared paperwork forms; the first two have a Privacy Act notice (the survey is anonymous).

① *SF 278 Executive Branch Personnel Public Financial Disclosure Report* (03/2000 edition, cleared through 03/31/2003, control # 3209-0001).

② *OGE Form 201 Request to Inspect or Receive Copies of SF 278 ... or Other Covered Record* (October 1999 edition, cleared through 07/31/2002, control # 3209-0002); optional branchwide form — agencies may develop their own access forms provided all needed Ethics Act information is included.

③ *Public Financial Disclosure Access Customer Service Survey* (OGE-only form) (10/98 edition, cleared through 01/31/2002, control # 3209-0009).

Electronic Forms Initiatives:

- Currently available in the forms section of OGE's Web site (<http://www.usoge.gov/>): viewable, downloadable and "fillable" Portable Document Format (PDF) and eXtensible Markup Language (XML) electronic versions of the SF 278 report form — can be filled out online & printed out for manual signature, the PDF version requires additional software to save data (check with agency's own computer systems personnel), plus plain viewable & downloadable PDF SF 278 form; just viewable & downloadable PDF file available for the OGE Form 201 access form.

- Also note USDA's developing National Finance Center (NFC) Web-based SF 278, plus slowly evolving area of "smart ethics forms" — standardized electronic question & answer technique (like electronic tax forms) (*note* EPA CD-ROM of prior 6/94 edition of SF 278) — possible OGE co-sponsorship and/or "generic" paperwork clearance (additional paperwork clearance required if used by 10 or more private citizens annually — nominees/new entrants/terminees).

- N.B.: print-out & manual signature for now (unless OGE-approved pilot — so far, just limited site electronic filing trials, for OGE 450 & Optional 450-A forms, including at Marine Corps Systems Command).

- Future option of electronic filing & signatures, by October 2003 if practicable, under the Government Paperwork Elimination Act (GPEA), title XVII of P.L. 105-277 (10/21/98), 44 U.S.C. § 3504 n., and Office of Management and Budget, Justice Department & other lead agencies' guidelines (OMB's final overall guidance (M-00-10 of 04/25/00), published at 65 Fed. Reg. 25508-25521 (05/02/00), & OIRA memos of 07/25/00 & 09/24/01 (all available at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>); Justice's Nov. 2000 legal guidance (online at <http://www.cybercrime.gov/ecommerce.html#GFA>); NARA has transmitted its GPEA records management guidance (available at <http://www.nara.gov/records/policy/gpea.html>) in Bulletin 2001-02 of 10/19/00, available at <http://www.nara.gov/records/policy/b2001-02.html>).

- Plus, note OGE's role & ongoing guidance as the supervising ethics office for the executive branch concerning electronic issues regarding the SF 278 and other branchwide ethics forms OGE sponsors.

● In the summer of 1999, OGE conducted an executive branch agency electronic financial disclosure report forms survey (OGE Form 201 not included) through its desk officer system. Of the 128 agencies surveyed, 90 (70%) responded. *Results summary:* (A) 41 agencies (46% of respondents) provided their employees with the option of electronic completion of financial disclosure reports; (B) of those 41 agencies, 32 (80%) had electronic form completion available for the SF 278; (C) overall, 38 agencies (95% of respondents) provided a fillable template (or “form filler”) electronic option, while 2 agencies (5%) provided a “smart form” question-and-answer format (interview process); (D) various means of access were provided, including computer hard drives, LANs, agency Internet Web sites or intranets, and CDs/diskettes; (E) 27 agencies (68%) provided for electronic storage after completion; (F) 25 agencies (74%) reported their employees were satisfied with using electronic forms completion; and (G) 37 agencies (97%) did not currently offer “electronic signatures,” though 62 agencies (70%) of all 90 responding agencies hoped for a future option of both electronic completion and filing.

Internet Availability Issues:

● Future issue for OGE and executive branch departments and agencies under the Ethics in Government Act & Government Paperwork Elimination Act — the possibility of electronic OGE Form 201 completion & access to completed SF 278 reports: fill out 201 information on Government Web sites, review prohibited uses notification, Privacy Act & paperwork notices, then obtain access (view/download) to completed SF 278 reports and/or other covered records via the Internet? If so, should there be any limit to the number of reports/records retrievable at one time? Probably not; though OGE has a six-report limit for telephone-initiated requests, more can be requested in writing by letter or FAX. The Internet access scenario seems more analogous to written, rather than telephonic, requests. Plus, online access would impose even less processing burden on the Government, once forms were “posted” (if they were). Such availability would also promote ease of access by requesters.

● Certain private Internet Web sites already have some public reports available online: (i) <http://www.opensecrets.org/pfds/> (Center for Responsive Politics — reports of 2000 election Presidential & Vice Presidential candidates (& then-incumbents) and members of Congress, with a bypassable warning on

prohibited uses); (ii) <http://www.publicintegrity.org/reports/bop2000/pfd.htm> (Center for Public Integrity — SF 278s for 2000 Presidential candidates, with a prohibited uses warning); and (iii) <http://www.apbnews.com/cjsystem/judges/> (APBnews.com — certain Federal judges' reports, no prohibited uses warning); + other sites (newspapers, etc.) at times include online story-related SF 278s.